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NO.

SUPREME COURT OF THE UNITED STATES

PETITIONER

versus ON PETITION FOR WRIT OF CERTIORARI TO

KENTUCKY

RESPONDENT

J. ARMSTRONG

C. LLOYD VEST II

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QUESTIONS PRESENTED FOR REVIEW

I.

SHOULD THE COURT GRANT CERTIORARI TO CONSIDER AN ALLEGED ERROR OF STATE LAW.?

II.

DO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS FORBID JOINDER OF DEFENDANTS FOR TRIAL WHERE ONE IS ELIGIBLE FOR CAPITAL PUNISHMENT BUT THE OTHER IS NOT?

III.

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IV.

WERE THE JURY INSTRUCTIONS IN THIS CASE CONSTITUTIONALLY INSUFFICIENT? ASSUMING THE HOLDING OF CARTER V. KENTUCKY SHOULD BE EXTENDED TO THE PENALTY PHASE OF CAPITAL PROCEEDINGS, WOULD SUCH AN INSTRUCTION BE REQUIRED WHERE THERE IS NO "PROPER REQUEST" FOR SUCH INSTRUCTIONS.

V.

WAS THE PETITIONER ENTITLED TO, AS A MATTER OF CONSTITUTIONAL LAW, SENTENCING OPTION INSTRUCTIONS OTHER THAN THE ONES WHICH WERE GIVEN AT TRIAL?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

KEVIN N. STANFORD — PETITIONER

versus — ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY — RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Respondent accepts Petitioner's citation to the opinion below.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are reproduced in the appendix to the petition.

COUNTERSTATEMENT OF THE CASE

The victim in this case, twenty-year-old Barbel Poore, was an employee of the Cheker gas station on Cane Run Road in Louisville, Kentucky (TE 399, 942, 947). She and her parents were acquainted with Petitioner, having conversed with him on several occasions (TE 519). Petitioner lived in the apartment complex adjoining the Cheker station (TE 407-408, 475).

Troy Johnson was a mutual friend of both Petitioner and his co-defendant, David Buchanan (TE 1029, 1047). On January 7, 1981 Buchanan approached Johnson with a plan to rob the Cheker station (TE 1029-1030). Johnson provided Buchanan with a handgun (TE 1031).

Buchanan telephoned Petitioner in regard to the plan (TE 1032-1033). The three met at Petitioner's apartment, then proceeded to the Cheker station where Johnson remained inside the car (TE 1032-1034). As Petitioner was leaving the car to go inside the Cheker station, he expressed concern to Buchanan and Johnson that the victim might recognize him by his clothing (Id.).

During the next forty-five minutes, Barbel Poore was robbed, raped, orally sodomized, and anally sodomized (TE 364-365, 372, 398, 405, 485-486, 946, 1034-1035, 1044, 1053). Once during this ordeal, Buchanan returned to the car with a two-gallon can of gasoline and told Johnson to continue waiting (Id.). The sexual attack took place on the restroom floor of the gas station (TE 485). Petitioner initially raped the victim in a standing position while she held onto the sink, after which he and Buchanan took turns raping and sodomizing her on the floor (Id.)

Eventually, Buchanan returned to Johnson's car a second time and instructed him to follow Petitioner, who was driving the victim in a car belonging to her mother (TE 1035-1037). After both cars arrived at a secluded area on Shanks Lane in Louisville, Buchanan got out and walked over to the victim's car where Petitioner was standing (Id.).

Petitioner allowed the victim to smoke a cigarette before killing her execution-style (TE 486). Petitioner leaned inside the victim's car and shot her in the face from point-blank range (TE 364, 366-367, 1037). After this shot was fired, Johnson exited his car, poured the stolen gasoline into his tank, started it, and began backing up (TE 1037-1038). Petitioner then fired a second shot into the back of the victim's head, causing her death (TE 364, 366-368, 372, 486, 1037-1038).

Two passersby observed Petitioner and Buchanan walking from the victim's car back to the getaway car (TE 954-955, 985-987). Though able to describe their general appearance, Amona Dorsey could not identify Petitioner or Buchanan (TE 986-987). Kerise Ison, a passenger in Dorsey's car, heard the gunshots and became suspicious when one of the defendants put his head down (TE 954-955). Ison noticed that the one who put his head down was "tagging behind" the other and that he put something inside his coat pocket (TE 957, 963).

The victim's corpse was left kneeling in the back seat of her mother's car, naked from the waist down and with her buttocks elevated (TE 401). A "large volume of semen" was on the left sleeve, front and back hem of her outer jacket, on her inner jacket, on her sweater, on her panties, and on the back seat of her mother's car where her head lay. (TE 401, 792-793, 796-798, 800, 805-806). Among the foreign pubic hairs on the victim's buttocks was one similar in microscopic characteristics to those belonging to Petitioner (TE 578, 585, 602, 604, 645, 792, 794-795, 807, 811). Injuries to the victim's anus included a

contusion "with radiating abrasions over the anal mucosa over the entire circumferential surface," inside of which were "large quantities of identifiable spermatoza." (TE 363-365).

Buchanan got into the front seat of Johnson's two-door car before Petitioner got into the back seat (TE 1040). As they were driving away from the murder scene, Petitioner smiled and asked Johnson whether he "wanted to do anything else." (TE 1041). When Johnson responded negatively, Petitioner tossed the murder weapon into the front seat (Id.). Johnson dropped him off at the intersection of Shanks Lane and Cane Run Road, across the street from the Cheker station (Id.).

Later that night, a neighbor named Alexis Sloan saw Petitioner carry two large boxes of cigarettes away from the Cheker station (TE 1003, 1006-1007). Sloan agreed to "hold" them for Petitioner (TE 1008). On the following day, Sloan and one Owen Smyzer put the cigarettes into plastic garbage bags and roamed about the neighborhood selling them (TE 1011-1012). Afterwards, Petitioner told Sloan that the cigarettes were from the Cheker station and that he had "made a play" for them (TE 1013-1014, 1022-1023).

While awaiting trial for capital murder, Petitioner sneaked up behind a security guard, put the end of a pencil against his ear and said, "Click, click, click, just like the girl, I'm going to blow your mother. . . brains out." (TE 1062-1063).

On another occasion, a different corrections officer heard Petitioner bragging to seven other juvenile inmates about what he had done to Barbel Poore (TE 1076-1078). Petitioner

boasted to the corrections officer about his having sodomized and raped the victim (TE 1080). He explained the execution of the victim as follows:

> I had to shoot her, the bitch lived next door to me and she would recognize me. * * * I guess we could have tied her up or something or beat the . . . out of her and told her, if she tell, we would kill her. (TE 1082).

At that moment during his conversation with the corrections officer, Petitioner "began laughing." (Id.).

Petitioner was convicted of capital murder, first degree sodomy, first degree robbery, and receiving stolen property. (TR 81-CR-1218, 18-21, 28-31). He was sentenced to death and 45 years in prison (TE 1542; TR 82-CR-0406, 314). His jointly-tried co-defendant, David Buchanan, was convicted of murder, first degree sodomy, first degree robbery, and first degree rape. Exempted from capital punishment because he was not the "triggerman", Buchanan was sentenced to life and 60 years in prison. Buchanan v. Commonwealth, Ky., 691 S.W.2d 210 (1985), affirmed, Buchanan v. Kentucky, ___U.S.___, 107 S.Ct. 2906 (1987).

ARGUMENT

I.

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER AN ALLEGED ERROR OF STATE LAW.

On the first morning of trial, Stanford filed a document entitled "Voir Dire", which contained 23 questions dealing with the veniremen's exposure to pre-trial publicity and their understanding of reasonable doubt (R 201-203, 82-CR-0406). Stanford also filed a document entitled "Defendant's Proposed Voir Dire Questions Concerning Capital Punishment", which

included 29 questions. That list included questions concerning the defendant's right not to testify, their ability to consider the death penalty, their ability to consider a penalty less than death, and other miscellaneous matters.

During their discussion that morning, the trial judge informed counsel that he would question the veniremen individually concerning their ability to consider the death penalty and their ability to serve for 2 weeks (TR 38-39). While discussing which questions would be asked during individual voir dire, Stanford's counsel noted, "We have tendered proposed questions to the capital phase which I take it are overruled?" (TR 39). The judge responded, "Yeah." (TR 39). Counsel then requested the judge to address pre-trial publicity in the individual examinations and the judge agreed to do so. (TR 39-40). Counsel did not indicate other areas he felt should be addressed during individual voir dire. The judge then indicated that, after individual voir dire was completed, counsel would be permitted to address other matters during several examinations of the panel (TR 40-42). Although Stanford alleged on appeal that the judge's ruling unconstitutionally restricted his voir dire examination, the only issue raised by the exchange described above was whether the trial judge erred by failing to include these questions in the individual voir dire examination. Allocation of the voir dire questioning is purely a question of state law.

Kentucky Rule of Criminal Procedure (RCr) 9.38 provides:

> The court may permit the attorney for the Commonwealth and the defendant or his attorney to conduct the examination of

> prospective jurors or may itself conduct the examination. In the latter event the court shall permit the attorney for the Commonwealth and the defendant or his attorney to supplement the examination by such further inquiry as it deems proper. The court may itself submit to the prospective jurors such additional questions submitted by the parties as it deems proper.

The Kentucky Supreme Court has noted that the separate examination of jurors or prospective jurors is a matter of procedural policy. Ferguson v. Commonwealth, Ky., 512 S.W.2d 501 (1974). Furthermore, that court has consistently held that the manner of conducting voir dire is left to the trial judge and his actions will not be disturbed unless he abuses his discretion in the manner in which the examination was conducted. Wilson v. Commonwealth, Ky., 601 S.W.2d 280 (1980) and Ferguson, supra. Most importantly, that rule includes the trial court's decision to require counsel to voir dire jurors collectively, rather than individually. Woodford v. Commonwealth, Ky., 376 S.W.2d 526 (1964). Judge Leibson simply limited the number of questions he would address during individual voir dire, allowing counsel to conduct further inquiry during collective voir dire. The judge did not abuse his discretion by declining to conduct all of the voir dire on an individual basis. If there was any abuse involved, it was simply a violation of Kentucky's Procedural Rule. Because no federal question is involved, the writ should be denied. See Pulley v. Harris, 465 U.S. 37, 41 (1984); Palmer v. Ohio, 248 U.S. 32 (1918).

Kentucky recognizes that, on appeal and in his petition, Stanford has attempted to extrapolate the judge's perfunctory "Yeah" into a blanket restriction on Stanford's

ability to ask any of the tendered questions, particularly those questions intended to "life-quality" the jury. However, this claim is refuted by the facts of the case. Stanford clearly states, "Defense counsel tendered a list of questions concerning capital punishment and pretrial publicity which he wanted the court to ask". (Petition at 10). Therefore, his position must be that the trial judge's decision not to ask those questions individually must have led trial counsel to believe that counsel was barred from asking any of the questions on the 2 lists. In fact, Stanford argues counsel chose not to ask any of the "life- qualifying" questions based upon that belief, coupled with counsel's fear of a contempt sanction if he dared to determine the scope of the judge's ruling. The Court should immediately note counsel's lack of temerity on this point by his immediate request that the trial judge modify his ruling so that pre-trial publicity would be included in individual voir dire (TR 39). This request clearly shows that counsel understood the judge's ruling to be exactly what it was - an allocation of topics between individual and collective voir dire. Stanford's argument is further undermined by the fact that the trial judge indicated that counsel would explore other topics, including reasonable doubt, during collective voir dire. Stanford's counsel did, in fact, address reasonable doubt during general voir dire (TR 303). Finally, counsel addressed Stanford's right not to testify - a topic included in his proposed capital voir dire list - during general voir dire (TR 303). These actions plainly refute Stanford's claim that counsel believes that the trial judge imposed a blanket restriction on counsel from asking his proposed questions. Counsel simply failed to ask.

If the Court should conclude that a federal question was implicated, Kentucky would argue that this failure to ask amounted to an independent and adequate state ground for the Kentucky Supreme Court's decision. Although Kentucky conceded and the court recognized that a capital defendant has a right to life-qualify the jury under the principles of Wainwright v. Witt, 469 U.S. 412 (1985), the Kentucky Supreme Court denied relief because there was no ruling on the merits of counsel's ability to employ this procedure. Stanford v. Commonwealth, Ky., 734 S.W.2d 781, 786 (1987). Based upon that resolution, Kentucky would argue that the decision to deny relief rests squarely upon a finding of procedural default.[1/] This is especially so where the Kentucky Supreme Court recognizes that a federal constitutional right exists, but denies relief because counsel failed to obtain a ruling.[2/] Although the opinion does not contain a plain statement that this ruling is based upon Kentucky law, the decision does clearly and expressly indicate that it is based on bona fide separate, adequate and independent state grounds. Michigan v. Long, 465 U.S. 1032, 1041 (1985). The writ should not issue.

1/. Kentucky specifically argued that the claim should be dismissed due to the procedural default, citing White v. Commonwealth, Ky., 611 S.W.2d 529 (1980).

2/. Contrary to Stanford's assertion, Kentucky has seen several capital proceedings where defense counsel has employed the "trial strategy" of building reversible error into the record. Although there is a question about the ethical propriety of such a strategy, the practice is a reality in this state. See, e.g., Arguments IV and V. Counsel's action would satisfy the Kentucky Supreme Court's ruling that it would not disregard a claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic.

II.

THE CONSTITUTION DOES NOT REQUIRE SEVERANCE OF DEFENDANTS FOR TRIAL SIMPLY BECAUSE ONE FACES A DIFFERENT POSSIBLE PUNISHMENT THAN THE OTHER

Petitioner argues that he was entitled to a separate trial by reason of co-defendant Buchanan's ineligibility for the death penalty. Disclaiming there is any benefit to be derived from a joint trial, Petitioner contends that the Constitution forbids joinder of defendants for trial unless all face the identical possible punishment. According to Petitioner, it is fundamentally unfair for the sentencer to learn that the government considers one participant in a crime more culpable than the other.

Kentucky responds that the virtues of a joint trial are many. The disadvantages, if any, are few. Beyond the obvious economical considerations is the fact that a joint trial affords the fact-finder a greater perspective on the whole case. It enables the sentencer to more accurately assess relative culpability of all the participants in a crime, or series of crimes as in the present case. A joint trial also ensures against inconsistent results by allowing the same sentencer to determine the appropriate punishment for all those who took part in the crime. In a joint trial the sentencer need not speculate as to the possible punishment a co-defendant might receive in a separate proceeding. In addition, it avoids the fortuitous result of one defendant gaining a tactical advantage over the other by being the last to be tried. This further minimizes delay in the punishment of crimes, all of which promotes reliabilty in the judicial process.

Twice last term, the Court spoke at some length on the significant benefits a joint trial generally confers upon all concerned. In Richardson v. Marsh, ___U.S.___, 107 S.Ct. 1702 (1987) the Court said:

> Joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years. Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (Feb. 20, 1987). Many joint trials -- for example, those involving large conspiracies to import and distribute illegal drugs -- involve a dozen or more codefendants. * * * It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability -- advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. Id. at 1708 (emphasis added).

In Buchanan v. Kentucky, ___U.S.___, 107 S.Ct. 2906 (1987) the Court observed that:

> As demonstrated by the statutory provision providing for joinder of offenses and defendants[3/] . . . the Commonwealth has determined that it has an interest in providing prosecutors with the authority to proceed in a joint trial when the conduct of more than one criminal defendant arises out of the same events. Underlying the Commonwealth's interest in a joint trial is a related interest in promoting the reliability and consistency of its judicial process, an interest that may benefit the noncapital codefendant as well. In joint trials, the jury obtains a more complete view of all the facts underlying the charges than would be possible in separate trials. From such a perspective, it may be able to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing. See ABA Standards for Criminal Justice 13-2:2 (2d ed. 1980). This jury perspective is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events, where there is a single victim, and where, in fact, the defendants are indicted on several of the same counts. Id. at 2915 (emphasis added).

> The Commonwealth's interest in a joint trial is also bound up with a concern that it not be required to undergo the burden of presenting the same evidence to different juries where, as here, two defendants, only one of whom is eligible for a death sentence, are charged with crimes arising out of the same events. Id. at 2915.

3/. See RCr 9.12, permitting joinder of defendants for trial, and RCr 6.18, permitting consolidation of offenses for trial.

Owing to this preference for joint trials, a criminal defendant is not entitled to severance unless he makes a positive showing prior to trial that joinder would be unduly prejudicial to him. RCr 9.16; Commonwealth v. Rogers, Ky., 698 S.W.2d 839 (1985). The trial judge has considerable discretion in ruling upon such a motion. Wilson v. Commonwealth, Ky., 695 S.W.2d 854, 858 (1985).

In this case, co-defendant Buchanan faced the same possible punishment as Petitioner until shortly before trial. (TR 81-CR-1218, 18-21, 28-31). Prior to trial, however, Buchanan sought:

> . . . dismissal of the capital portion of the indictment against him on the basis that Stanford had been the triggerman, that [Buchanan] had no intent to kill Poore, and that, therefore under Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 140 (1982), [Buchanan] could not be sentenced to death. . . . Without opinion and with no objection from the prosecution, the court granted this motion. Buchanan v. Kentucky, supra, 107 S.Ct. at 2910 (emphasis added).

The foregoing underscored language refutes Petitioner's contention that the trial judge invaded the province of the jury in assessing relative culpability. The trial judge did not make any factual or legal determination that one defendant was more blameworthy than the other. The prosecutor conceded Buchanan's point, effectively withdrawing his request for the death penalty against that particular defendant. The trial judge could not very well require the prosecutor to oppose the motion and seek Buchanan's death. Neither was the trial judge required to grant Petitioner a separate trial on this basis alone.

Petitioner's complaint in this case boils down to an unfounded contention that Buchanan might have been the triggerman after all. There was no such evidence, however.

Petitioner failed to positively show, before trial, that joinder would be unfairly prejudicial to him. Commonwealth v. Rogers, supra; Wilson v. Commonwealth, supra. Buchanan's involvement in the killing of Barbel Poore was impressive. He had planned the robbery; he enlisted the assistance of Petitoner and Troy Johnson; he timed the robbery so that the victim would be closing up the gas station and therefore alone; he not only procured the murder weapon, but insisted that ammunition be supplied for the gun; he directed Johnson to follow Petitioner from the gas station to the murder scene; he stood next to Petitioner when the gunshots were fired; he had the same motive as Petitioner for permanently silencing the victim. Buchanan v. Commonwealth, Ky., 691 S.W.2d 210, 211-212 (1985). The significance and extent of Buchanan's participation in the murder might have been lost on the jury in his absence from Petitioner's trial. Petitioner could only have benefitted by being tried together with Buchanan. Severance of defendants for trial was not constitutionally required. See Shaffer v. United States, 362 U.S. 511 (1960), where it was observed that even an improper joinder of defendants for trial is not a constitutional violation in and of itself. See also United States v. Lane, ___U.S.___, 106 S.Ct. 725, 730, n. 8 (1986), to the same effect.

The petition for writ of certiorari should be denied accordingly.

III.

THE KENTUCKY SUPREME COURT'S DECISION IN THIS CASE IS CONSISTENT WITH LOCKETT V. OHIO. ALTERNATIVELY, ANY TECHNICAL VIOLATION THEREOF WAS HARMLESS BEYOND A REASONABLE DOUBT.

During the penalty phase of the trial, Stanford called Robert Jones to testify. (TR 1483). The Commonwealth objected to this testimony as irrelevant because it was too narrowly focused upon Mr. Jones' experience as a former death row inmate. Defense counsel argued that Jones should be allowed to give his philosophical opinion of whether the death penalty should be rendered, with his knowledge of Stanford (TR 1485). The trial court tentatively sustained the objection, subject to change after hearing Jones' testimony on avowal. (TR 1486-1487). See RCr (Ky. Rule of Crim. Proc.) 9.52.

During this avowal testimony, Mr. Jones noted that he had been associated with four programs which dealt with juveniles. (TR 1488). Mr. Jones was also vice-chairman of the Kentucky Coalition Against the Death Penalty. (TR 1488-1489). From his testimony, it was apparent that his primary function was to gather information concerning the death penalty and to travel around the country speaking out against the death penalty. (TR 1489-1490, 1492-1493, 1496). In fact, it was apparent that Mr. Jones' almost exclusive reason for testifying was to once again vocalize his opposition to the death penalty in general, relating this to his personal experience and philosophy and to the phisosophies of other speakers, specifically the widow of Dr. Martin Luther King. (TR 1490, 1492-1497). Mr. Jones testified

on avowal that he had become acquainted with Stanford while Jones was a youth counsellor at the children's center. During 1978 and 1979[4] (TR 1490-1491), Jones did speak to Stanford on at least one occasion during the week prior to trial, at the request of Stanford's attorney, (TR 1491).[5] The only testimony by Jones that even remotely related to Stanford was that, in Jones' opinion, incarceration in an adult institution would be more appropriate because such an institution would provide control and rehabilitation programs. (TR 1491-1492, 1494).[6] At the conclusion of Jones' avowal testimony, the trial court ruled that Jones was not qualified to give his opinion concerning Stanford's chances for rehabilitation and that his testimony was merely cumulative, at best. (TR 1498-1500).

4/ It is significant that Jones did not provide any details concerning his relationship with Stanford during this period--the number of times they had talked, the average length of these conversations, or the nature of the conversations. (TR 1490-1491). Based upon his limited testimony, the court could have reasonable concluded that Jones simply knew Stanford to the extent that they would spead as they passed.

5/ The fact that Jones' personal knowledge concerning Stanford was all but non-existent was evidenced by Jones' comment, "...I've heard that Kevin had a drug problem." (TR 1493), emphasis added. As the proponent of this testimony, Stanford had the burden of showing that Jones had sufficient knowledge to provide relevant testimony about Stanford's character or prior record. Kentucky submits that Stanford did not meet that burden.

6/ In reality, this testimony did not actually relate to Stanford's character or prior record. As with his other testimony, Jones was simply voicing his preference for imprisonment over the death penalty, in general.

Certiorari is not necessary to develop the law in this area. The Court clearly defined the parameters for admissibility of such testimony in Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), by holding that the sentencer, in all but the rarest kind of capital case, be allowed to consider as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. However, the Court specifically noted that nothing in the opinion limited the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense. Lockett, 438 U.S. at 604, n.12. Jones' testimony was properly excluded because it did not have any bearing on those three factors. Similar testimony was also excluded by the Georgia Supreme Court in Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, 672-673 (1980). Cf. Evans v. Thigpen, 631 F. Supp. 274 (S.D. Miss. 1986), affirmed, Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. den., 107 S.Ct. 3278 (1987). The decision of the Kentucky Supreme Court was consistent with Lockett.

Even if the Court should find a technical violation of Lockett, Kentucky would submit that such error was harmless because Jones' testimony was simply cumulative.[7] As noted earlier, Jones' testimony purportedly related to Stanford was

7/ The Court has indicated that a violation of Lockett is subject to harmless error analysis. Hitchcock v. Dugger, 451 U.S. ____, 107 S.Ct. 1821, 1824, (1987); Skipper v. South Carolina, 476 U.S. ____, 106 S.Ct. 1669, 1673 (1986).

specifically that an adult penal institution would be the more appropriate remedy for him because such an institution provides control and rehabilitative programs. This information had already been presented to the jury through earlier witnesses. Stephen Smith testified about the rehabilitative programs available at adult penal institutions. (TR 1379-1381). Dana Mattison, James Berry, Linda Luking, and Lloyd Davis testified that Stanford needed some form of control in his environment. (TR 1411-1412, 1439-1443). Finally, Mr. Davis testified that Stanford could be rehabilitated in the penal system. (TR 1468). Any error was harmless. The writ should be denied.

IV.

ASSUMING THE HOLDING OF CARTER V. KENTUCKY SHOULD BE EXTENDED TO THE PENALTY PHASE OF CAPITAL PROCEEDINGS, WOULD SUCH AN INSTRUCTION WOULD NOT BE REQUIRED WHERE THERE IS NO "PROPER REQEUST" FOR SUCH INSTRUCTIONS.

Stanford urges the Court to extend the holding of Carter v. Kentucky, 450 U.S. 288 (1981) to the penalty phase of capital trial proceedings. While agreeing that the Court has not addressed this question, Kentucky would submit that this case does not provide the Court with a proper vehicle to resolve the issue.

In Carter, the Court held that the Fifth Amendment requires that a criminal trial judge must give a "no-adverse-inference" jury instruction, upon proper request, during the guilt phase of a criminal proceeding. Carter, 450 U.S. at 300, 305. (emphasis added). Kentucky incorporated this holding into its Rule of Criminal Procedure 9.54(3).

However, the Kentucky Supreme Court has consistently noted that the Carter holding only required such an instruction upon proper request. James v. Commonwealth, Ky., 679 S.W.2d 238, 239 (1984), Ice v. Commonwealth, Ky., 667 S.W.2d 671, 677 (1984), and Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 44 (1983). Therefore, before deciding whether to extend Carter to the penalty phase of capital proceedings in a general proposition, the Kentucky Supreme Court was first required to determine whether Carter was triggered, in this proceeding, by a proper request.

At the time of this trial, Kentucky Rule of Criminal Procedure (RCr) 9.54(2) provided:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes his objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection. (emphasis added).

Although the Rule provides a defendant three different formats for making a request, the Rule clearly requires that the particular objection must be fairly and adequately presented to the trial judge for the request to be proper. The Kentucky Supreme Court recognized this to be true in Long v. Commonwealth, 559 S.W.2d 382 (Ky. 1977). In Long, that court imposed a rule of strict compliance with the RCr 9.54(2)

requirement that a defendant must fairly and adequately present his position to the trial court. Although Long had tendered an instruction, the Kentucky Supreme Court found that he had not made a proper request for a different instruction because the tendered instruction was not in proper format and Long did not orally advise the trial court of his specific objection to the instruction given. That court was required to reach the same conclusion on the facts of this case.

During the guilt phase of the trial, the judge noted, "We need a Fifth Amendment instruction." (TR 1186). Stanford's counsel indicated that he had submitted a version he considered to be a little more detailed (TR 1186-I187). Because counsel had tendered his proposed instructions to the court reporter, he provided the judge with a copy of his proposed version of this instruction (TR 1187). Finding the Commonwealth's proposed instruction sufficient, the judge overruled Stanford's proposed instruction (TR 1187). As Instruction Number 12, the judge instructed the jury that they shall not draw any inference of guilt from Stanford's election not to testify and shall not allow it to prejudice him in any way (TR 1257). Kentucky believes that it is important to note that, during the discussions concerning instructions for the guilt phase, Stanford's attorney stated, "As usual, we are submitting separate reasonable doubt, burden of proof, presumption of innocence and indictment instructions in our packet." (TR 1187-1188).

During their discussion concerning instructions during the penalty phase, Stanford did not specifically request that a "no adverse inference" instruction be given (TR 1361-1366). Instead, counsel merely voiced a general objection to the instructions and noted that he had provided the court with a copy of his tendered instructions (TR 1365). Contrary to his stated practice, counsel did not tender a separate "no adverse inference" instruction. Instead, he had language to that effect in two other instructions.

On lines 34 and 35 of his 44-line tendered instructions, entitled "Instruction at Beginning of Hearing", was the sentence, "The defendant is not required to testify and cannot hold it against him if he chooses not to testify." From the record, it appears that counsel agreed to the judge's decision to use the Commonwealth's version of his instructions (TR 1361). In any event, counsel did not bring this language to the judge's attention (TR 1361). The last two sentences of Stanford's tendered "reasonable doubt" instructions provided, "You are further instructed that Kevin Stanford is not required to testify in the penalty phase hearing. His election not to testify cannot be construed as having any weight against him, nor shall you consider that fact against him." Stanford did not object to the instruction given regarding reasonable doubt nor did he bring the above language to the court's attention. (TR 1361-1366, 1507-1508).

Stanford did not follow his stated practice of submitting a separate instruction regarding "no adverse inference" and compounded the problem by hiding such language in other instructions. Absent an objection which would have called this language to the judge's attention, Stanford did not "fairly and adequately" present his position to the trial court. Therefore, there was no "proper request" for Carter purposes. Assuming arguendo that Carter should be extended to the penalty phase of capital proceedings, this litigant is not entitled to relief. The writ should not issue.

V.

THE JURY INSTRUCTIONS GIVEN ON SENTENCING OPTIONS WERE SUFFICIENT, AND STANFORD WAS NEITHER PROCEDURALLY NOR SUBSTANTIVELY ENTITLED TO ANY OTHER SUCH INSTRUCTIONS.

At the outset, Kentucky would note that it urged the Kentucky Supreme court to summarily reject Stanford's argument that the capital sentencing instructions were constitutionally defective, based upon Stanford's procedural default. Under RCr 9.54(2), Stanford was required to fairly and adequately present his argument to the trial judge's attention. (CF. Argument IV). Stanford did not submit a separate instruction that would have advised the jury that a finding that an aggravating circumstance existed did not require them to vote for the death penalty. Instead, on lines 19-22 of its 44 line tendered instruction, entitled "Instruction At Beginning of Hearing," Stanford inserted the following sentences:

> A finding that the aggravating factors do exist does not mean that you must give the death penalty to Kevin N. Stanford. The question of whether Kevin N. Stanford is put to death is left to your discretion.

From an examination of the record, Kentucky believes that counsel agreed with the judge's decision to use the prosecutor's version of this instruction. (TR 1361). In any event, Stanford did not object, with supporting grounds, to the instruction that was given. (TE 1361). Stanford also relied, on appeal, on his tendered "Reasonable Doubt" instruction which contained the sentence, "Even if you believe the aggravating circumstances exist beyond a reasonable doubt you are not bound to return a finding of death." Again, Stanford did not object to the instructions that were given regarding reasonable doubt, or bring the above language to the court's attention. (TR 1361-1366).

Even if Stanford had properly preserved this claim of error, he was not entitled to relief. The cases cited by Stanford simply require that the instructions clearly inform the jury that they could impose a sentence of imprisonment despite the existence of an aggravating circumstance. As the Georgia Supreme Court held in the seminal decision of Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, 291-292 (1978):

> [I]n considering the adequacy of a jury charge on the sentencing phase of the trial, the ultimate test is whether a reasonable juror, considering the charge as a whole, would know that he should consider all the facts and circumstances of the case as presented during both phases of the trial (which necessarily include any mitigating and aggravating facts) and that, even though he might find one or more of the statutory aggravating circumstances to exist, would know that he might recommend life imprisonment. This test is substantive rather than formalistic and conforms with the mandate of the Supreme Court of the United States that "a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." [citations omitted].

Accord Goodwin v. Balkom, 684 F.2d 794 (11th Cir. 1982). The instructions in this case complied with the requirement of Spivey and the other cases.

Instruction Number 3 provided:

> ". . . you cannot recommend that he be sentenced to death unless you are satisfied from the evidence beyond a reasonable doubt that at least one of the statements listed as (a) and (b) in Instruction Number 1 (aggravating circumstances) is true in its entirety. . . . You are further instructed that a sentence of life or term of twenty (20) years imprisonment or more can be returned even if you believe the number of aggravating circumstances are weaker than the number of mitigating circumstances, or even if you believe that no mitigating circumstances exist." (TR 1507).

Instruction No. 4 provided:

> (a) If you have a reasonable doubt as to the truth or existence of any one of the 'aggravating circumstances' listed in Instruction Number 1, you shall not made any finding with respect to it.
>
> (b) If upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall recommend a sentence of imprisonment instead. (TR 1507-1508).

As the Court can see, the jury was first informed that they could not impose the death penalty unless they found the existence of an aggravating circumstance beyond a reasonable doubt. The jury was then informed that they could impose a sentence of imprisonment even if they believed there were less mitigating than aggravating circumstances or even if they found that no mitigating circumstances existed. Finally, they were instructed that if they had a reasonable doubt, on the whole

case, that the death penalty was appropriate, they shall recommend a sentence of imprisonment instead. These instructions clearly informed the jury that they could impose a sentence of imprisonment despite the existence of an aggravating circumstance.

Stanford has failed to show a conflict between the decision of the Kentucky Supreme Court and decisions of other jurisdictions. Certiorari should be denied accordingly.

VI.

PETITIONER'S POST-ARREST CONFESSION WAS NOT OBTAINED IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION OR RIGHT TO COUNSEL. NEITHER DID IT YIELD PHYSICAL EVIDENCE SUBJECT TO THE EXCLUSIONARY RULE.

After securing the crime scenes, police canvassed the apartment complex adjoining the Cheker gas station. (SH I 12). There, Audrey Jackson and other tenants provided information suggesting that Petitioner had participated in the crimes. (SH I 16; III 312-313; IV 473-474).

Police picked up Petitioner and, with his mother's prior consent, took him to headquarters where he denied any participation in the crimes. (SH I 14-15, 91-99). Petitioner eventually requested counsel, at which time the questioning promptly ceased and a public defender was contacted on his behalf. (SH I 15-18, 1000-103). Petitioner and his public defender left the police station without any charges being brought (Id).

Very shortly thereafter, when the information provided by Audrey Jackson and the other apartment complex tenants was corroborated by Owen Smyzer and Alexis Sloan, police arrested

Petitioner for Receiving Stolen Property. (SH I 83-85) Smyzer and Sloan gave statements against their own penal interest by admitting to police that they had assisted Petitioner in disposing of the cigarettes stolen from the Cheker gas station. (SH I 21-25). It had been reported by informants other than the apartment complex tenants that Smyzer and Sloan rode around town selling cartons of cigarettes out of plastic garbage bags. (SH I 21-25; III 307-308).

Sloan told police that he had seen David Buchanan in the company of another black male at 7:00 on the night in question. (SH III 321, 329). At that time they were sitting inside a green car on the apartment complex parking lot next to the Cheker gas station. (Id.) At 10:45 that night, Sloan saw Petitioner carry away two large boxes of cigarettes for which he had "just made a play", i.e., he had stolen them. (SH III 322, 338; IV 475). At Petitioner's request, Sloan took some of the cigarettes and then he divided them with Smyzer. (SH II 223). On the following day, Petitioner told Sloan that the cigarettes were from the Cheker gas station "where the lady was killed." (SH III 323). In his tape recorded statement, Sloan told the police:

> I asked him, you know, where they come from, he said his buddy and him had took this girl over to Shanks Lane, they had shot her in the head. He said he didn't have nothing to do with the shooting....(SH III 346).

This corroborated Smyzer's statement to the same effect, all of which gave the police probable cause to arrest Petitioner. (SH I 21-25, 83-85; II 225-226). By that time, of course, the police already knew from their investigation of the

crime scenes that: (i) the victim had been executed on Shanks Lane, (ii) with a gunshot to the head, (iii) in connection with the theft of approximately 300 cartons of cigarettes from the Cheker gas station. Thus the informants' tips were sufficiently detailed, and corroborated by independent investigation, to give the police probable cause to arrest Petitioner. Under Kentucky law,

> Probable cause exists when the facts and circumstances within the arresting officers' knowledge or of which they have reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed or is being committed. Shull v. Commonwealth, Ky., 475 S.W.2d 469, 471 (1971).

See also Sampson v. Commonwealth, Ky., 609 S.W.2d 355, 358 (1980): "The prior knowledge required by an officer [to arrest] is not such as guarantees a conviction...." Petitioner's parenthetical objection to probable cause (see footnote 21, page 24 of the petition) is without legal or factual basis.

The thrust of Petitioner's argument is that his post-arrest confession was obtained in violation of the privilege against self-incrimination and the right to counsel. Petitioner contends that despite the suppression of his confession from evidence, both such constitutional protections were violated because it yielded information used by the police to obtain other incriminating proof. Petitioner claims that all "fruits" of this "poisonous tree"--virtually every item of evidence obtained after his confession was given--likewise should have been suppressed. As the Court will see, however, the suppression of Petitioner's

confession was not constitutionally required. Moreover, the police obtained additional incriminating evidence in spite of Petitioner's misleading confession, not because of it.

Upon taking Petitioner into custody, the arresting officer immediately reminded him of his rights--as had been done earlier when he was questioned without arrest--but further advised that no questions would be asked at such time. (SH I 76; II 232). Enroute to police headquarters, however, Petitioner initiated a conversation in which it was volunteered that he had been acquainted with the murder victim. (SH I 77-78). At this time the only charge for which Petitioner had been arrested was Receiving Stolen Property, i.e., the stolen cigarettes. (SH I 75, 83-84).

When he arrived at the police station, Petitioner signed a written waiver of his rights. (SH II 231-232). Although Petitioner's mother had previously consented to his being picked up for questioning, in light of his written waiver of rights the police failed to notify defense counsel of Petitioner's post-arrest decision to confess. (SH I 85; II 268-270). In his ensuing confession, Petitioner gave the police a false lead by naming Calvin Buchanan as a participant in the crimes instead of David Buchanan. (SH II 233). Petitioner's confession also implicated a participant named "Troy", but he gave no last name or any other means of identifying this accomplice in the crimes. (SH I 44).

Because the police had failed to double-check with Petitioner's mother before obtaining the confession, the

prosecutor would later concede inadmissibility of it on state law grounds[8] but he argued that no constitutional violation occurred. (TR I 113-114). The trial judge suppressed the confession on both statutory and constitutional grounds, however. (TR I 114-115). Citing Edwards v. Arizona, 451 U.S. 477 (1981), the trial judge considered it improper for police to have "initiate[d]" a post-arrest interrogation since Petitioner had requested and received counsel on the earlier occasion when his non-custodial questioning took place. (Id.)

As it did at trial (TR I 113-114) and on direct appeal to the state supreme court (Appellee Brief, page 58), Kentucky submits that Petitioner's suppressed confession was not obtained in violation of his constitutional rights. Following Petitioner's trial, the Edwards decision on which Judge Leibson relied was clarified in Wyrick v. Fields, 459 U.S. 42 (1982) and Oregon v. Bradshaw, 462 U.S. 1039 (1983), both of which apply to this case by virtue of the new retroactivity rule announced in Griffith v. Kentucky. ____ U.S. ____, 107 S. Ct. 708 (1987). In Wyrick and Bradshaw it was held that a criminal defendant who initiates a conversation with police thereby invites interrogation which may lead to a constitutionally admissible confession, despite his prior assertion of the right to counsel.

8/ Petitioner was seventeen years old at the time. When a juvenile is taken into custody on a criminal charge, state law requires parental notification. Ky. Rev. Stat. 208.110; Davidson v. Commonwealth, Ky. App., 613 S.W.2d 431 (1981). Petitioner's mother was notified prior to his pre-arrest questioning of January 13, 1981, and in fact consented to it, but such notice was not renewed when the police arrested him several hours later that same day, after he and defense counsel had left headquarters together.

E.g., "Well, what is going to happen to me now?" 462 U.S. at 1045; the victim from whom the cigarettes were stolen had been a "sweet lady". (SH I 77-78). As for the voluntariness of his ensuing confession, it is fair to say that under the circumstances, Petitioner's will to remain silent most certainly was not undermined by repeated rounds of questioning. Michigan v. Mosley, 423 U.S. 96 (1975). The two interrogations were hours apart, separated by a spontaneous admission that Petitioner knew about the victim, and the confession was given only after learning that the police had gathered a strong case against him. Petitioner's right to remain silent was scrupulously honored and his confession followed an oral warning as well as a written waiver of rights. In short, the trial judge erred by ruling that the Constitution required suppression of Petitioner's confession.[9]

Not only was there no "poisonous tree", there were no "fruits" derived therefrom either. Police solved the case in spite of the misleading information Petitioner gave them, not because of it. United States v. Ceccolini, 435 U.S. 268 (1978). It was Calvin Buchanan who led police to co-defendant David Buchanan and tricked him into incriminating himself during a tape

9/ Consistent with the concession it made at trial, however, Kentucky continues to agree that the confession was inadmissible on state law grounds since Petitioner's mother was not notified of his arrest. Davidson v. Commonwealth, supra. But while Ky. Rev. Stat. 208.110 affects admissibility of Petitioner's confession, it does not require suppression of any "fruits" derived therefrom. The statute is merely a procedural rule which does not confer any new rights upon a juvenile arrestee. Instead, it only requires parental notification that the juvenile has been taken into custody.

recorded telephone conversation. (SH III 380-381). It was David Buchanan who implicated Troy Johnson, supplying a last name for this co-defendant which Petitioner did not. (SH I 36-38, 65). Petitioner's mother, with the advice of his defense lawyer, consented to the seizure of the gas station keys from her apartment. (SH III 366-372). The only fruit borne of Petitioner's suppressed confession had been a false lead implicating Calvin Buchanan, who did not participate in any of the crimes. (SH II 231-233; TR I 115-116). It neither solved the case nor contributed to probable cause against Petitioner.

In view of all the foregoing, the petition for writ of certiorari should be denied.

VII.

THE INTRODUCTION OF A "SANITIZED" CONFESSION BY A NON-TESTIFYING CO-DEFENDANT DID NOT DENY PETITIONER HIS RIGHT TO CONFRONTATION.

In Cruz v. New York, ____ U.S. _____, 107 S.Ct. 1714 (1987) the Court held that the Confrontation Clause bars admission of a non-testifying co-defendant's confession if it facially incriminates the defendant, even though the jury is admonished not to condsider such evidence against him.

Decided on the same day as Cruz, the opinion in Richardson v. Marsh, _____ U.S. _____, 107 S.Ct. 1702 (1987) held that the Confrontation Clause is not violated by the introduction of a non-testifying co-defendant's confession if it fails to facially incriminate the defendant, where the jury is instructed to disregard such evidence accordingly in determining his guilt or innocence.

What distinguishes these two cases is that in Cruz, the co-defendant's confession directly implicated the defendant, whereas in Richardson it did not. Consequently, only in Richardson was it realistic to assume that the jury could genuinely adhere to the admonition limiting the effect of the co-defendant's confession:

"There is an important distinction between this case and Bruton[10], which causes it to fall outside the narrow exception we have created. In Bruton, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. (citations omitted). Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." (citations omitted)." By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial....Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be

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10/ Bruton v. United States, 391 U.S. 123 (1968).

simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule." 107 S.Ct. at 1707-1708.

In the present case, co-defendant Buchanan's confession was "sanitized" so as to remove all references to Petitioner by name. As presented to the jury, Buchanan's confession referred to the existence of an accomplice only as the "other person" or the "other subject." (TE IV 482-486). Therefore the confession of this non-testifying co-defendant, while it alluded to the existence of an accomplice, did not directly or facially implicate Petitioner as a participant in the crimes.

Neither did Buchanan's confession, when "linked" with the other evidence at trial, necessarily incriminate Petitioner by inference. The jurors were well aware that Troy Johnson also participated in this crime spree. Although Johnson testified at the joint trial of Petitioner and Buchanan that he (Johnson) had merely supplied the murder weapon, procured ammunition for it and had driven the getaway car, the jury could have concluded that the "other person" referred to in Buchanan's edited confession was not Petitioner but Johnson instead. For that matter, the jury could have believed that the "other person" was Buchanan's uncle Calvin. As noted on page 4 of the petition, witnesses Amona Dorsey and Kerise Ison initially identified Buchanan's uncle Calvin from a line-up as one of the killers, without positively identifying Petitioner. Uncle Calvin, in fact, was

arrested and charged with the murder until he tricked David Buchanan into admitting his own guilt. See Stanford v. Commonwealth, Ky., 734 S.W.2d 781 (1987) at 783. Indeed, at trial a policeman testified that "Calvin Buchanan had been implicated by [Petitioner] as being the person who had participated...." (TE IV 523), emphasis added. In short, Buchanan's edited confession implicated only himself and an unnamed accomplice who could have been any one of at least three different people even when considered together with "linkage" evidence. Thus, Petitioner was not even indirectly incriminated by Buchanan's confession.[11]

Petitioner complains to this Court that no limiting admonition was given to the jury, but he fails to explain why it was not done. The reason was that his trial lawyer did not want an instruction limiting the effect of Buchanan's confession. Satisfied that Petitioner would not be referred to by name in Buchanan's confession, defense counsel acknowledged on the record that a limiting instruction could backfire, i.e., actually focus attention on Petitioner. (TE IV 482). After expressing his dissatisfaction with the trial judge's idea of admonishing the

11/ Footnote 5 of the majority opinion in Richardson v. Marsh, supra, has not escaped Kentucky's attention: "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." 107 S.Ct. at 1709. Since the "other person" referred to in Buchanan's edited confession could have implicated his uncle Calvin, or Troy Johnson, who admitted at least some participation in the crimes, the confession under consideration here might as well have not even alluded to the existence of any accomplice as far as Petitioner is concerned. Consequently, Kentucky believes that Richardson v. Marsh controls this situation.

jury, defense counsel failed to pursue the matter further. (Id.) Although he never specifically asked that the trial judge refrain from giving the admonition, defense counsel made it clear that he thought such a charge would backfire and, accordingly, failed to ask that it be given. While the Kentucky Supreme Court generally considers unpreserved allegations of errors in capital cases, it has departed from this policy where an omission or non-ruling appears to have been contrived by defense counsel as a matter of trial strategy. See, e.g., Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984). The absence of a limiting instruction in this case obviously resulted from defense counsel's trial strategy. He indicated a belief, on the record, that such a charge would be futile or focus attention on Petitioner. If a criminal defendant can knowingly waive other benefits and considerations--see Buchanan v. Kentucky, supra, at 2921 (Marshall, J., dissenting) concerning "residual doubt"--he surely can do so with respect to a limiting admonition.

Kentucky alternatively argues, as it did before the state supreme court, that any conceivable error in this matter would have been harmless beyond a reasonable doubt considering the spectacular evidence of Petitioner's guilt. In addition to the eyewitness account of participant Troy Johnson (TE VII 1037-1038, 1044) are Petitioner's fingerprints found inside the car where Barbel Poore was executed (TE V 708, 718-719; VII 917),

Petitioner's pubic hairs found on the victim's corpse and clothing (TE VI 804-808), and the gas station keys found on top of Petitioner's dresser (TE IV 473-475).

Beyond the foregoing are Petitioner's own admissions of guilt. He told Alexis Sloan that he had "made a play" for (stole) the boxes of cigarettes from the Cheker gas station. (TE VII 1002-1003). Petitioner told corrections employee Richard Reetzke that he would blow his "mother...brains out" as he had done "just like the girl." (TE VIII 1063). Petitioner bragged to other inmates about the crimes he had committed against Barbel Poore, then laughed when he resumed such boasting to corrections employee Michael Nally. (TE VIII 1076-1078, 1080, 1082). Thus, any possible error would have been harmless. Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972).

Accordingly, the petition for writ of certiorari should be denied.

VIII.

THE EIGHTH AMENDMENT DOES NOT LIMIT CRIMINAL PUNISHMENT ON THE BASIS OF AGE ALONE.

On November 9, 1987 the Court heard oral argument of this identical issue in Thompson v. Oklahoma, No. 86-6169, cert. granted ___U.S. ___, 40 Cr.L.Rptr. 4175 (February 23, 1987). There, Kentucky filed an amici curiae brief on behalf of Oklahoma and 18 other States. For the sake of brevity, Kentucky hereby incorporates those 20 pages of argument rather than repeat them in this brief. Copies of Kentucky's amici curiae brief in Thompson have been served upon counsel for Petitioner in this case.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that three (3) copies hereof have been mailed, postage prepaid, to the Honorable Frank W. Heft, Jr., Chief Appellate Defender of the Jefferson District Public Defender, and the Honorable Daniel T. Goyette, Jefferson District Public Defender, both at 200 Civic Plaza, 719 West Jefferson Street, in Louisville, Kentucky 40202, on this the 2 day of January, 1988.

David A. Smith
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